Filed 12/28/04 Adoption of Nathaniel B. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

Adoption of NATHANIEL B., a Minor.	
BRADLEY B. et al., Plaintiffs and Appellants, v. CASEY J., Defendant and Respondent.	C046091 (Super.Ct.No. FL00866) Nevada County Butz, J.
CASEY J., Plaintiff and Respondent, v. MARTINA S., Defendant and Respondent; BRADLEY B. et al., Appellants.	C046091 (Super.Ct.No. FL01222) Nevada County Butz., J.

Guardianship of NATHANIEL B., a Minor	
JENNIFER B. et al., Petitioners and Appellants, v. CASEY J., Objector and Respondent; MARTINA S., Respondent.	C046176 (Super.Ct.No. P13871) Nevada County Bryan, J.

Upon the birth of Nathaniel B., his mother Martina S.[1] gave him to Bradley and Jennifer B. for adoption. Nathaniel's biological father, Casey J., opposed the adoption and sought custody of Nathaniel. The trial court ultimately determined that Casey retained his parental right to object to Nathaniel's adoption under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, awarded custody of the child to Casey, and denied Bradley and Jennifer's petitions for guardianship.

On appeal, Bradley and Jennifer contend: (1) there was insufficient evidence to support the trial court's determination that Casey retained his right to object to the adoption under

---

[1] For ease of reference, we refer to the various parties by their first names.

Kelsey S.; (2) the trial court misapplied Family Code[2] section 3041 in awarding custody of Nathaniel to Casey; and (3) the trial court ignored statutory rules governing guardianship proceedings.

Finding no merit in Bradley and Jennifer's arguments, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After meeting at work in November 2001, Martina (age 20) and Casey (age 23) began dating three months later, and Casey moved into Martina's apartment in Yuba City. At the time, Casey was separated from his wife, Elizabeth. When Martina lost her apartment some months later, Casey and Martina and her two-year-old son from another relationship moved in with Casey's mother in Marysville, probably in May or early June 2002.

After they moved in with Casey's mother, Martina learned she was pregnant and told Casey. According to Casey, their initial plan was to live and raise their son together. Around August, however, Casey and Martina ended their relationship, and Casey moved out of his mother's house. Martina continued to live in Casey's mother's house with her other son until February 2003, just before the birth of her son with Casey. Meanwhile, Casey reconciled with Elizabeth, who was pregnant by another man.

---

[2] All further statutory references are to the Family Code unless otherwise indicated.

It was Casey's understanding that when their son was born, Martina was going to give custody to Casey and Elizabeth. On February 19, 2003, Casey learned that Martina was at the hospital in Yuba City ready to give birth. He rushed to the hospital, where he was joined by other members of his family, but he was told the hospital was not allowed to give out any information and he was escorted out. Unbeknownst to Casey, Martina had arranged for their son to be adopted by Bradley and Jennifer, a couple from Nevada County. Shortly after Nathaniel's birth, the child was delivered to Bradley and Jennifer, and they took him home the next day.

The day of Nathaniel's birth, Casey was personally served with a notice of alleged paternity, which referred to the possibility of an adoption in Nevada County. The next day, in Yuba County, Casey filed a petition to establish his paternity of Nathaniel (hereafter the paternity action). A week later, he filed an order to show cause in the paternity action seeking custody of Nathaniel.

On March 7, 2003, Bradley and Jennifer filed their adoption request in Nevada County (case No. FL00866) (hereafter the adoption action). Two weeks later, they filed a petition in the adoption action to terminate Casey's parental rights. Casey opposed the petition.

In May, the parties stipulated in the paternity action that Casey was Nathaniel's biological father. In July, the paternity action was transferred to Nevada County (case No. FL01222) and consolidated with the adoption action.

On August 15, 2003, the consolidated actions came on for hearing, and the court decided to first hear Bradley and Jennifer's petition to terminate Casey's parental rights. Testimony was received on August 15, September 29, October 6, and October 24.

After hearing argument on October 24, the court announced its ruling on Bradley and Jennifer's petition. Although finding the case "a close call," the court concluded Casey had "met the burden of proof in accomplishing the determination that he has a constitutional right to withhold his consent to the adoption." The court then proceeded to determine whether Casey or Bradley and Jennifer should have custody of Nathaniel. After hearing further testimony and argument, the court took the matter under submission.

Three days later, on October 27, 2003, the court filed its written decision, finding "it is in the child's best interest to remain with [Bradley and Jennifer] in a temporary custodial arrangement, with a well-planned and thoughtful transition worked out to accomplish an eventual transfer to Casey's custody."

That same day, Bradley and Jennifer filed a petition for temporary guardianship of Nathaniel, seeking to retain custody pending an appeal, and also a petition for permanent guardianship (case No. P13871) (hereafter the guardianship action). In a further attempt to prevent Casey from taking custody of Nathaniel pending their appeal, on October 30, 2003,

Bradley and Jennifer filed an ex parte motion to stay the "judgement" in the consolidated actions.

The court denied the motion for a stay and ordered the parties to agree on an expert to prepare a plan for the transition of Nathaniel's custody from Bradley and Jennifer to Casey. The court then continued the consolidated actions, along with the guardianship action, to December 15.

On December 5, the court entered its order in the consolidated actions denying Bradley and Jennifer's petition to terminate Casey's parental rights.

On December 9, Dr. Ron Meister submitted a report recommending a transition plan.

On December 15, the matters came on for hearing. Bradley and Jennifer requested that the court grant them temporary guardianship of Nathaniel "pending a hearing on the full guardianship with the probate investigator's report returned as well as appointment of counsel for the minor." The court denied the request for a probate investigation as untimely and proceeded to take testimony on the guardianship petition. Following that testimony and further argument, the court denied the petition, concluding it was "in the best interest of this child to be with his father." The court then referred the parties to immediate mediation "to resolve issues concerning the transition." Upon return from that mediation, the court adopted Dr. Meister's recommendations with certain modifications.

On January 17, 2004, Bradley and Jennifer relinquished custody of Nathaniel to Casey.

On February 3, 2004, Bradley and Jennifer filed a timely notice of appeal from the December 5, 2003, order in the consolidated actions. On February 13, 2004, Bradley and Jennifer filed a premature notice of appeal in the guardianship action, seeking review of the court's December 15, 2003 ruling. Later, on March 11, 2004, the court entered its judgment in the guardianship action denying Bradley and Jennifer's petitions. Pursuant to rule 2(d)(2) of the California Rules of Court, we exercise our discretion to treat Bradley and Jennifer's notice of appeal in the guardianship action as having been "filed immediately after entry of judgment."

We granted Bradley and Jennifer's motion to consolidate the two appeals.

DISCUSSION

I

Substantial Evidence Supports The Trial Court's Denial Of The Petition To Terminate Casey's Parental Rights

A

Governing Law

Under California statutory law, the biological father of a child who is not deemed a "presumed father" has no right to object to the adoption of his child unless the court finds "it is in the best interest of the child that the father should be allowed to retain his parental rights."[3] (§ 7664, subd. (b); see

---

[3] It is undisputed that Casey did not qualify as a "presumed father."

also § 7611 [setting forth the conditions under which "[a] man is presumed to be the natural father of a child"].) Under this statutory scheme, "If the court finds . . . it is in the child's best interest that an adoption be allowed to proceed, it shall order that [the father's] consent is not required for an adoption. This finding terminates all parental rights and responsibilities with respect to the child." (§ 7664, subd. (b).)

In *Adoption of Kelsey S.*, *supra*, 1 Cal.4th at page 816, however, our Supreme Court held that this statutory scheme violates the constitutional rights of some fathers. Specifically, the court held: "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities -- emotional, financial and otherwise -- his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Id.* at p. 849.)

The *Kelsey S.* court went on to explain that in determining whether a father "has sufficiently and timely demonstrated a full commitment to his parental responsibilities," "[a] court should consider all factors relevant to that determination. The father's conduct both *before and after* the child's birth must be

considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child -- not merely to block adoption by others.' [Citation.] A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849, fn. omitted.)

In *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060, the Supreme Court further clarified that "an unwed father has no federal constitutional right to withhold consent to an at-birth, third party adoption under our decision in *Kelsey S.*, *supra*, 1 Cal.4th 816, unless he shows that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child."

Here, the trial court denied Bradley and Jennifer's petition to terminate Casey's parental rights and held Casey's consent was necessary for the adoption of Nathaniel because Casey "promptly demonstrated as full a commitment to parental responsibilities during Martina's pregnancy and within a very short time after he learned of the pregnancy as Martina allowed

and the circumstances permitted." Bradley and Jennifer contest this determination.[4]

B

Standard Of Review

On appeal from a trial court's decision on a petition to terminate parental rights in an adoption proceeding, we apply the substantial evidence standard of review. (*Adoption of Michael S.*, *supra*, 10 Cal.4th at p. 1064 (conc. & dis. opn. of Kennard, J.).) Under this deferential standard of review, "our task '"begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted"' to support the trial court's ruling. [Citation.] That ruling is presumed correct, and 'all intendments and presumptions are indulged in favor of its correctness.' [Citation.] In other words, the evidence must be viewed in the light most favorable to the prevailing party." (*Ibid.*) In reviewing the record for substantial evidence, "[w]e do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the [trial] court's order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding

---

[4] Bradley and Jennifer do not contend the trial court should have found Casey unfit as a parent.

or order is not supported by substantial evidence." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

Thus, the question here is whether Bradley and Jennifer have shown that, even viewing the record most favorably to Casey, there is no substantial evidence to support the trial court's determination that Casey "promptly demonstrated as full a commitment to parental responsibilities during Martina's pregnancy and within a very short time after he learned of the pregnancy as Martina allowed and the circumstances permitted."

C

Factors Not In Dispute

In answering this question, it is critical to point out what is *not* in dispute. In arguing that Casey's actions before Nathaniel's birth were insufficient to retain his parental rights under *Kelsey S.* and *Michael H.*, Bradley and Jennifer focus entirely on Casey's alleged lack of "emotional, financial, medical and other assistance to [Martina] during her pregnancy." But these factors are only part of the relevant inquiry in determining Casey's "commitment to his parental responsibilities." Under *Kelsey S.*, the trial court was required to consider "*all* factors relevant to th[e] determination" of whether Casey "promptly c[a]me[] forward and demonstrate[d] a full commitment to his parental responsibilities." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics added.) In particular, in addition to considering the issues of emotional, medical, and financial assistance, the trial court had to consider whether Casey

publicly acknowledged paternity, whether Casey demonstrated "'a willingness himself to assume full custody of'" Nathaniel, and whether Casey promptly brought legal action to seek custody. (*Ibid.*)

On the first point, Casey testified that within hours of learning of the pregnancy, he called his grandmother and told her "she was going to be a great grandmother." His mother also testified that he told her she was going to be a grandmother.

On the second point, Casey testified it was initially his intention to live with Martina and raise the baby together. After Casey and Martina ended their relationship and Martina mentioned having an abortion, Casey offered to raise the child, and Casey and Elizabeth made plans to take the baby into their home. Martina herself admitted that Casey indicated to her that he and Elizabeth would like to take the baby.

On the third point, the record shows Casey filed a paternity action the day after Nathaniel was born and filed an order to show cause regarding custody the following week.

The foregoing evidence shows that Casey publicly acknowledged paternity, demonstrated a willingness to assume full custody of Nathaniel, and promptly brought legal action to seek custody of Nathaniel -- and Bradley and Jennifer do not claim otherwise. Instead, focusing on the issues of emotional, medical, and financial assistance, Bradley and Jennifer contend Casey "abdicated his obligation actively to provide support to [Martina] and her unborn child" during the pregnancy. They suggest that because Casey failed to provide these types of

assistance to Martina, his "actions prior to Nathaniel's birth were insufficient as a matter of law to meet the constitutional standard developed in the Kelsey S. and Michael H. decisions," notwithstanding that he publicly acknowledged paternity, demonstrated a willingness to assume full custody of Nathaniel, and promptly brought legal action to seek custody of Nathaniel.

D

Emotional Support

Bradley and Jennifer first contend "[t]here is no evidence that [Casey] provided adequate emotional support to [Martina] during her pregnancy." In particular, they point to the fact that he "never offered to marry" her and that he "left [her] and moved out of his mother's house where he was living with her shortly after discovering [she] was expecting his child" and "[s]oon thereafter . . . reconciled with his wife, Elizabeth, and took responsibility for her child by another man, leaving [Martina] hurt and upset."

Although there appears to be little dispute about the foregoing facts, in assessing the significance of those facts under *Kelsey S.*, it must be kept in mind that the touchstone determination is whether Casey did "all that he could reasonably do *under the circumstances*" "to act like a father." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at pp. 850, 851.) The Supreme Court recognized that no bright lines can be drawn in this area and that each father's efforts at assuming his parental responsibilities have to be judged in light of the relevant circumstances facing him, including what "the mother will

allow." (*Id.* at p. 849.) Thus, Casey's actions must be assessed in light of the realities of his relationship with Martina.

Although Martina did testify that it "upset" her when Casey reconciled with Elizabeth, Bradley and Jennifer point to no evidence that Martina actually wanted to marry Casey or even to maintain any kind of romantic or domestic relationship with him. Indeed, Martina testified that although she and Casey lived together for about five months, she "never got along with [him]," and "it was a constant falling out" between them. When asked if there was "some specific thing that caused [her] and Casey to get into a fight" before Casey moved out of his mother's house (leaving Martina there), Martina replied, "We just didn't get along, so he moved out."

Given these circumstances, Casey's refusal to propose marriage to Martina can hardly be deemed a failure to provide "adequate emotional support" to her during her pregnancy, particularly given that he remained married to Elizabeth at the time. Nor can Casey be faulted for reconciling with his wife, even though it may have upset Martina. To show "a full commitment to his parental responsibilities" (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849), Casey was not required to try to maintain a relationship with Martina that she herself did not want, nor was he required to abstain from rekindling a relationship with a woman who apparently did want him.

E

Medical Support

Bradley and Jennifer next contend Casey did not provide adequate medical support during Martina's pregnancy. Specifically, they assert that "[o]f the two ultrasound appointments and at least six doctor appointments that [Martina] attended during her pregnancy, [Casey] took her to none, and attended only one, an ultrasound." They also assert that he failed to accompany Martina on a trip to the emergency room early in her pregnancy.

Viewed in the light most favorable to Casey, the evidence shows that in addition to the ultrasound he attended, Casey attempted to attend Martina's first doctor's appointment, but he went to the wrong office because he received incorrect directions, and he arrived at the right office only after the appointment was over. As for the remaining appointments,[5] Casey was either unable to attend them because he was working in Roseville and Chico (which was the case when Casey's mother took Martina to the emergency room) or because he had a court date (which happened once), or because he chose not to attend them.

Bradley and Jennifer contend that Casey's decision not to attend some of the doctor's appointments shows his "immaturity" and his lack of appropriate support for Martina, because Casey

---

[5] Casey testified that he knew of approximately six doctor's appointments Martina had during her pregnancy. The trial court found that Martina went to the doctor "four, possibly five times."

avoided the appointments based on his belief that Martina's sister (who took Martina to those appointments) did not like him, even though she never told him so. In making that argument, however, Bradley and Jennifer ignore Casey's testimony that Martina told him she did not want him to go to the doctor's appointments when her sister took her and that Martina "would not allow [Casey] to be around her sister to take her to any doctor appointments." Bradley and Jennifer also attempt to minimize Casey's testimony that he nonetheless assisted Martina during those appointments by watching her other son while she went to the doctor.

When the evidence is viewed most favorably to Casey, there is a substantial basis for finding that he assumed his parental responsibilities with respect to Martina's medical visits as fully as Martina would allow and his circumstances permitted.

F

Financial Support

On the remaining issue of financial support, Bradley and Jennifer contend "the record refutes any suggestion that [Casey] provided financial support to [Martina] during her pregnancy." Bradley and Jennifer paint a picture in which Martina lived off welfare payments and food stamps, with additional support from Casey's family but not from Casey himself. They also complain that Casey "did not even offer to assist with medical expenses."

With respect to the issue of medical expenses during the pregnancy, Bradley and Jennifer point to no evidence that Martina ever incurred any. Casey testified that he did not pay

for any of Martina's medical expenses because Martina "had Medi-Cal," and when asked why he never offered to "help out," Casey responded, "Because there was no medical expenses to help out with." Bradley and Jennifer cite no evidence to the contrary.

As for Martina's living expenses, the evidence viewed in the light most favorable to Casey shows that when Martina lost her apartment, Casey arranged for them to live with his mother. While they lived at Casey's mother's house together, Casey contributed to their rent, food, and utilities. Casey also bought clothes, blankets, toys, and other things for the baby. When Casey moved out, he made arrangements with his mother for Martina to remain there. Although he no longer contributed to the rent after he moved out, after he became unemployed in late September 2002, he and his mother agreed that Martina and her son could remain in the house, and Casey would forego the repayment of money his mother owed him.[6] At some point, Casey no longer contributed to Martina's groceries because she had food stamps.

To the extent Bradley and Jennifer tell a different tale of Casey's actions, they do so in disregard of the substantial evidence standard of review, relying only on evidence that supports their version of events, rather than on the evidence that supports a characterization of events much more favorable to Casey, as we have set forth above. When the evidence is

---

[6] Casey's mother testified that he had earlier lent her about $6,000 to help her keep her house out of foreclosure.

viewed according to the applicable standard of review, it adequately supports the conclusion that Casey provided financial support to Martina during her pregnancy as his circumstances reasonably permitted.

G

Casey's Commitment To His Parental Responsibilities

In summary, it is undisputed that Casey publicly acknowledged paternity, demonstrated a willingness to assume full custody of Nathaniel, and promptly brought legal action to seek custody of Nathaniel. Furthermore, there is substantial evidence that Casey provided as much emotional, medical, and financial support to Martina during her pregnancy as she would allow and circumstances reasonably permitted. Thus, based on the entire record viewed in the light most favorable to Casey, it was reasonable for the trial court to find that Casey retained his parental right to withhold his consent to Nathaniel's adoption.

Relying on *Michael H.*, Bradley and Jennifer attempt to dispute this conclusion, arguing that "a basic comparison of the facts of this case with those reported in Michael H. -- a case where the natural father was held *not* to have a constitutional right to block an adoption" -- shows that Casey's actions did "not warrant [the] protection" of his parental rights. The proposed comparison is flawed because Bradley and Jennifer ignore the most fundamental differences between *Michael H.* and this case. Unlike Casey, the father in *Michael H.* did not promptly and fully commit to his parental responsibilities

because for the first five months after learning of the pregnancy he and the mother "'clearly planned . . . to give the child up'" for adoption, and because even after he decided he wanted to keep the child, the father did not communicate this decision to the mother or the adoptive parents until two weeks after the baby was born. (*Adoption of Michael H.*, *supra*, 10 Cal.4th at pp. 1048, 1060.) Here, on the other hand, the evidence shows that Casey promptly committed to assuming full custody of Nathaniel if Martina did not want custody, and Martina was aware of Casey's commitment well before Nathaniel was born. Thus, Casey is in no way comparable to the father in *Michael H.*

Because substantial evidence supports the trial court's determination that Casey "promptly demonstrated as full a commitment to parental responsibilities during Martina's pregnancy and within a very short time after he learned of the pregnancy as Martina allowed and the circumstances permitted," the trial court did not err in denying Bradley and Jennifer's petition to terminate Casey's parental rights and in allowing Casey to assert his parental right to object to Nathaniel's adoption.

II

The Trial Court Did Not Misapply Section 3041

In its written decision, the trial court reached the following conclusion on the issue of custody: "[T]he court finds that it is in the child's best interest to remain with [Bradley and Jennifer] in a temporary custodial arrangement,

with a well-planned and thoughtful transition worked out to accomplish an eventual transfer to Casey's custody. At the present time, Casey is a stranger to the child, through no fault of his own, as are the other members of his family. To transfer immediate custody to Casey would be detrimental to the child's emotional and psychological health and welfare by a preponderance of the evidence (Family Code §3041(c), (d)). The court finds that granting temporary custody to the nonparent, prospective adoptive parents is required to serve the best interest of the child at this time. The court has considered Dr. Roeder's declaration (Exhibit 4) in concluding that detriment would occur if the child were removed from the stable placement with [Bradley and Jennifer] who have assumed the role of his parents, fulfilling his physical and psychological needs for care and affection for a substantial period of time in a wholesome and stable environment (Family Code §3041)."

Bradley and Jennifer contend that in giving Casey custody of Nathaniel, the trial court improperly applied section 3041. We are not persuaded.

Section 3041 provides:

"(a) Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. . . .

"(b) Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence.

"(c) As used in this section, 'detriment to the child' includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.

"(d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary."

Under section 3041, when a nonparent seeks custody of a child, the burden is normally on the nonparent to prove by clear and convincing evidence "that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child." (§ 3041, subd. (a).) When, however, the nonparent seeking custody is someone "who has assumed, on a day-to-day basis, the role of [the child's] parent, fulfilling both the child's physical needs and the child's psychological needs for care and

affection, and who has assumed that role for a substantial period of time," section 3041 establishes a presumption that it is in the child's best interest to remain in the custody of the nonparent "and that parental custody would be detrimental to the child," and the burden shifts to the parent to prove otherwise by a preponderance of the evidence. (§ 3041, subds. (c), (d).) In other words, in a custody dispute between a child's parent and a nonparent who has assumed the role of the child's parent for a substantial period of time, the parent must prove by a preponderance of the evidence that granting him or her custody would not be detrimental to the child and would be in the child's best interest. If the parent does not carry this burden of proof, then the presumption prevails and custody of the child must remain with the nonparent.

There appears to be no dispute section 3041 applies here,[7] and no dispute that Bradley and Jennifer qualified as "person[s] described in subdivision (c)" of section 3041, as the court found in its written decision. Because Bradley and Jennifer were nonparents who had assumed the role of Nathaniel's parents

---

[7] On our own, we note the admonition in subdivision (b) of section 7664 that "[s]ection 3041 does not apply to a proceeding under this chapter" -- i.e., a proceeding to terminate the rights of a parent when the other parent has given the child up for adoption. (See § 7660 et seq.) It appears, however, that this admonition has no bearing here because the trial court determined the custody of Nathaniel in the paternity action that had been consolidated with the adoption action, rather than in the adoption action itself. In any event, neither side has raised this admonition, and both sides proceed on the assumption that section 3041 applies. So shall we.

for a substantial period of time, it fell to Casey to prove by a preponderance of the evidence that granting him custody would not be detrimental to Nathaniel and would instead be in Nathaniel's best interest.

Bradley and Jennifer contend the trial court "failed to perform the correct analysis" under section 3041 because the court "overlooked th[e] second part of the analysis required by . . . section 3041." According to Bradley and Jennifer, "[t]he superior court was required to make a finding, separate and apart from its finding regarding best interests, that the preponderance of the evidence rebutted the presumption that transfer of Nathaniel's custody to [Casey] would be detrimental to the child." They contend the court made no such finding on the issue of detriment "because the record, in fact, supported the opposite conclusion as the trial judge herself noted." According to them, "the superior court expressly found that 'detriment would occur if the child were removed from the stable placement with [Bradley and Jennifer].'"

Bradley and Jennifer take this passage from the trial court's decision out of context. The court expressly found "by a preponderance of the evidence" that "[t]o transfer *immediate* custody to Casey would be detrimental to the child's emotional and psychological health and welfare" and therefore "granting *temporary* custody to [Bradley and Jennifer] [wa]s required to serve the best interest of the child at this time." (Italics added.) It was in explaining these express findings that the trial court noted it had "considered Dr. Roeder's declaration

(Exhibit 4) in concluding that detriment would occur if the child were removed from the stable placement with" Bradley and Jennifer. Thus, the detriment to which the trial court was referring was the detriment it had previously found would occur to Nathaniel in the event of an *immediate* transfer of custody to Casey.

The trial court made no express finding that it would be detrimental to Nathaniel for there to be a *gradual* (as opposed to immediate) transfer of custody to Casey. And while Bradley and Jennifer contend that this omission means "[t]he superior court ignored section 3041(d) as it related to the question of permanent custody," we cannot agree. The trial court's express finding that an *immediate* transfer would be detrimental to Nathaniel implies a finding that a *gradual* transfer, following "a program of visitations between Casey and his son" "[a]nalogous to reunification efforts in a dependency context," would *not* be detrimental. Thus, we find no error in the trial court's application of section 3041.

III

Substantial Evidence Supports The Trial Court's Implicit Finding That A Gradual Transfer Of Custody To Casey Would Not Be Detrimental To Nathaniel

As a corollary to their previous argument, Bradley and Jennifer contend Casey "adduced no evidence that a change in custody would not be detrimental to the child." In other words, they contend there was no evidence to support the trial court's

implicit determination that a gradual transfer of custody to Casey would not be detrimental to Nathaniel. We disagree.

Bradley and Jennifer first argue that "[t]he only expert evidence provided to the court on this question, given by child psychologist Dr. Eugene Roeder, indicated that Nathaniel had formed a strong bond with [Bradley and Jennifer] and their adopted daughter, Riley, and that there was a substantial risk of regression in his development if he was removed from their home." They contend that because Dr. Roeder's "testimony regarding the likelihood of detriment to Nathaniel was uncontroverted," it was "therefore conclusive."

In making this argument, Bradley and Jennifer cite to testimony Dr. Roeder gave at the hearing on their guardianship petitions on December 15, 2003, nearly two months *after* the October custody hearing at which the court determined Casey should have custody of Nathaniel. The only expert evidence actually before the court at the October custody hearing, however, was Dr. Roeder's declaration, which the court admitted into evidence without objection and noted in its written decision that it had considered. Thus, in evaluating Bradley and Jennifer's substantial evidence argument, we first limit ourselves to the declaration that was before the court at the custody hearing, rather than the later testimony that was not.

In his declaration, Dr. Roeder attested he had "performed [a] functional emotional assessment of attachment" on Nathaniel, which demonstrated that the child was "closely and positively attached to Jennifer and Bradley." He offered no assessment as

to any detriment Nathaniel would or might suffer if custody were given to Casey. There was nothing in Dr. Roeder's declaration that compelled the trial court to find a gradual change of custody from Bradley and Jennifer to Casey would be detrimental to Nathaniel.

Even if we expand our evaluation of Bradley and Jennifer's substantial evidence argument to encompass the testimony Dr. Roeder gave later in the guardianship action, our conclusion does not change. Dr. Roeder testified that "it's actually hard to know what the effect would be" of removing a child from a stable environment where he is bonded. He went on to say that "it would be potentially detrimental" to remove Nathaniel from Bradley and Jennifer's home. Dr. Roeder acknowledged "[i]t would certainly be traumatic for a child of this age to be . . . permanently separated from the people with whom he's formed these primary attachments," and he said typically such a child would experience some temporary regression in his development, but he explained that Nathaniel could make it through the transition without suffering any permanent impairment to his long-term development if his new caregivers were able to help him deal with and overcome the trauma.

Essentially, Dr. Roeder testified that a change of custody would be traumatic for Nathaniel, but there was only a *potential* for permanent impairment in the child's long-term development. In asserting that Dr. Roeder testified to "a substantial risk of regression" and a "likelihood of detriment," Bradley and Jennifer simply mischaracterize his testimony. As with his

declaration, there was nothing in Dr. Roeder's testimony that compelled the trial court to find a gradual change of custody from Bradley and Jennifer to Casey would be to Nathaniel's detriment. Indeed, because Dr. Roeder acknowledged that Nathaniel could make it through the transition of custody without suffering any permanent impairment to his long-term development, Dr. Roeder's testimony actually provides support for the trial court's determination that a gradual transfer of custody to Casey would not be detrimental to Nathaniel.

Bradley and Jennifer next contend that the evidence was insufficient to overcome the presumption that Nathaniel would suffer detriment from a change in custody because of: (1) Casey's employment history; (2) his impending divorce from Elizabeth; (3) his two felony convictions; (4) his plan to change Nathaniel's name; and (5) the frequent changes in his living arrangements. Unfortunately, Bradley and Jennifer fail to explain how any of these factors, taken separately or together, precluded the court from finding that any detriment to Nathaniel from a change in custody could be avoided by a gradual transition.

Without a doubt, as between this court and the trial court, the trial court was in the best position to assess whether a "well-planned and thoughtful" transition of custody from Bradley and Jennifer to Casey could be accomplished without detriment to Nathaniel. The trial court saw and heard the parties as live human beings. We, on the other hand, have nothing more to go on than the cold paper record. Furthermore, under California law

"detriment has no clear-cut meaning and the courts must have flexibility to make fact-specific decisions in cases like this one." (*Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 66.) On the record before us, we cannot say there was insufficient evidence to support the implicit determination by the trial court in this case that a gradual transition of custody could be accomplished without detriment to Nathaniel.

IV

The Trial Court Did Not Ignore Statutory Rules Governing Guardianship Proceedings

With respect to the denial of their guardianship petitions, Bradley and Jennifer contend the trial court abused its discretion in waiving a guardianship investigation and erred in "ignor[ing] the test required by Family Code section 3041." We disagree.

As an initial matter, we note the guardianship petitions were nothing but a collateral attack on the court's decision in the consolidated adoption/paternity actions that Casey should have custody of Nathaniel. Although Bradley and Jennifer argued to the trial court during the presentation of evidence that the proposed guardianship was "a separate issue," the guardianship petitions in fact raised the very *same* issue as was litigated in the custody hearing in October 2003 -- who should have custody of Nathaniel, both in the short term and in the long term -- Casey, or Bradley and Jennifer. Indeed, in arguing the guardianship issue to the court following the presentation of evidence, Bradley and Jennifer contended a guardianship should

be instituted because "it would be detrimental to Nathaniel to be removed from the[ir] care and custody." But the trial court had already decided in the consolidated actions that it would *not* be detrimental for there to be a gradual transition of custody from Bradley and Jennifer to Casey. Thus, Bradley and Jennifer's attempt to convince the trial court in the guardianship action otherwise was nothing more than a collateral attack on the earlier ruling in the consolidated actions.

In any event, we find no abuse of discretion and no error in the denial of the guardianship petitions. In an argument that echoes those addressed to the ruling in the consolidated actions, Bradley and Jennifer first contend the court misapplied section 3041, because if the court had correctly applied the statute, it could not have found Casey had met his burden of proving it would not be detrimental for Nathaniel to be in Casey's custody. We have rejected that argument already with respect to the consolidated actions, and Bradley and Jennifer offer us no basis for reaching a different conclusion in the guardianship action. The trial court implicitly found it would not be detrimental to Nathaniel for Casey to have custody of him, if the change of custody occurred gradually, and the evidence was sufficient to support that finding. There was no misapplication of section 3041.

Bradley and Jennifer next argue that the trial court abused its discretion in refusing to order a guardianship investigation before denying their petitions. Again, we disagree.

Subdivision (a) of Probate Code section 1513 specifically provides that the court may waive a guardianship investigation. Bradley and Jennifer contend that because a Nevada County local court rule "manifests a strong preference for investigations in guardianship proceedings," and because of "the duty the state has to protect the welfare of its children, dismissing the need for an investigation [here] was improper."

This argument is without merit. The local court rule Bradley and Jennifer cite provides only that when the parties file any paper in a guardianship proceeding, they must provide the clerk with an extra copy for the court investigator.[8] By no means does this rule "manifest[] a strong preference for investigations in guardianship proceedings" or in any manner suggest the circumstances under which the court may waive a guardianship investigation. Rather, the rule simply expresses the requirement that when an investigation is *not* waived, the investigator must be provided with his or her own copy of all the papers on file with the court.

Furthermore, the trial court's determination that Bradley and Jennifer's request for a guardianship investigation was untimely was well within the court's discretion. Bradley and Jennifer filed their petitions on October 27, 2003, but did not

---

[8] "For all filings in conservatorships and guardianships, including initial petitions and subsequent petitions and motions, the petitioner or moving party and any party responding or objecting shall supply the clerk with an extra copy for the court investigator." (Super. Ct. Nevada County, Local Rules, rule 8.29.)

request an investigation until the hearing on December 15. The fact that Bradley and Jennifer made their "initial request for guardianship . . . at the conclusion of the trial in October" does not make their request for a guardianship *investigation* a month and one-half later timely. The parties were in court on October 30, and an investigation could have been requested then, but apparently was not. Indeed, had Bradley and Jennifer deemed a guardianship investigation critical to their attempts to retain custody of Nathaniel, they could have filed their guardianship petitions months earlier and sought to consolidate them with the adoption and paternity actions and secure a guardianship investigation before the issue of custody was ever tried in the consolidated actions. Under the circumstances, the trial court acted well within its discretion in denying Bradley and Jennifer's belated request for a guardianship investigation.

DISPOSITION

The orders are affirmed. Casey shall recover his costs on appeal. (Cal Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.